

**PRESENTATION OF
ATTORNEY GLENN CARBERRY
TO CONNECTICUT BROADBAND
INTERNET COORDINATING COUNCIL ON
POLE ATTACHMENT LICENSING
IMPROVEMENTS AND PROBLEMS**

December 6, 2010

INTRODUCTION

- Good morning. I am Attorney Glenn Carberry of the law firm of Tobin, Carberry, O'Malley, Riley & Selinger in New London.
- I am pleased to be invited to speak with you today about the importance of supporting broadband providers in Connecticut by establishing equal and timely access to poles and other telecommunications infrastructure.
- Our state is in a good position to succeed in expanding broadband access and improving network capacity in many ways.
- As you know, approximately two dozen companies provide various types of broadband service across the state.
- The State Legislature created this Council to identify funding opportunities and to encourage cooperation among governmental agencies and providers.
- The DPUC and the Department of Information Technology have obtained close to \$100 million in grant funds for broadband mapping and the deployment of improved fiber networks with your support.
- Meanwhile, the DPUC issued a landmark decision on pole attachments in 2008 which established fixed time intervals for pole owners to issue licenses to third party attachers, regulated the completion of make-ready work, and imposed other limitations on the pole owners' management of our telecommunications infrastructure.

SUMMARY OF THE PRESENTATION

- Despite these developments, I believe that telecommunications providers continue to face critical obstacles in trying to deploy facilities and fiber on poles, and in serving Connecticut customers. I also believe that this Council can serve as a catalyst for encouraging progress on these important issues.
- I will concentrate my presentation today on four points and I have prepared a handout for each of you summarizing these issues.
- First, I will outline the customer problems which have been created by the many uncertainties and structural flaws of the current licensing process.
- Second, I will present some policy reasons why action on these competitive issues is important to this Council, customers, and broadband providers.
- Third, I will discuss one proposal under review by the Pole Attachment Working Group to expedite the installation and expansion of fiber networks to customers through the use of temporary attachments on poles.
- Fourth, I will recommend to the Council some changes in the attachment licensing process to eliminate double administration and double charges by pole owners.
- By way of background, my legal practice over the past 20 years has included frequent involvement in proceedings in front of the DPUC on telecommunications and cable television issues. Our firm currently represents Fiber Technologies Networks and several other national broadband providers on regulatory matters in Connecticut. In addition to representing Fibertech in the pole attachment docket, I have actively participated in several dozen meetings of the Pole Attachment Working Group. My perspective and my bias on these issues is one of promoting fair competition, expediting access to poles, and encouraging broadband expansion.

PROBLEM ONE:

DELAYS IN SERVING CUSTOMERS

- I start with the proposition that telecommunications providers who want to add new customers or expand their services need to commit in contracts to a commercially reasonable date for service installations.
- Research shows that businesses and broadband customers considering new or improved voice, data, internet or other services expect installations to be completed in 30 to 45 days after ordering service.
- Currently, new telecommunication companies are not able to provide customers with this level of service with reasonable certainty in Connecticut. Even with the improvements created by the Department's Pole Decision, studies compiled by the Working Group show that licenses are issued to applicants within 50 days approximately 45% to 50% of the time, and these licenses are generally issued on applications involving a small number of poles.
- In addition, pole owners have experienced difficulty in achieving the Department's required 90 or 125 day timeframes for the issuance of licenses, on 10 percent to 15 percent of all applications submitted.
- In comparison to prior practice, there has been significant improvement in the licensing process. However, I would ask you to consider whether receiving a license within 90 days, 85% or 90% of the time is good enough.
- Would you go back to a restaurant if they brought you a meal within an hour only 9 out of 10 times, and sometimes you didn't get fed at all? That restaurant would go out of business.
- That is the potential danger here. Companies cannot compete effectively and the Department cannot establish a level playing field if the installation of customer services are periodically delayed or completion dates are uncertain.

PROBLEM TWO:

FRUSTRATING POLE ADMINISTRATION

- Another problem which has recently emerged is the unnecessary duplication and complexity of the pole administration system.
- In the interest of civility, I won't belabor the recent changes which have taken place in the way pole owners run the licensing system. These changes were initiated after the Department's Pole Decision was issued, and it became clear last year that the new licensing mandates were going to be fully implemented.
- At that time, AT&T and CL&P coincidentally ended their longstanding collaboration on licensing administration without any prior notice to the Department or the Working Group.
- Consequently, any broadband provider seeking to expand its facilities in the state must now execute three separate pole attachment agreements. The provider needs one agreement with CL&P, one with AT&T, and one with UI. A provider must also submit separate applications and separate application fees to each of the respective pole owners involved in a particular location before make-ready work can be completed and a license can be issued for an installation to proceed.
- Meanwhile, AT&T is not required to submit a license application for any new telecommunications installations on poles. The potential for delay, anti-competitive action, and duplicative procedures is obvious.
- On top of these requirements, any broadband provider which is not a cable company, a municipality or an ILEC telephone company must also file an application with the Department for authorization to install facilities in the public rights-of-way. If you check the DPUC's website, you will see that one company, Fibertech, has filed more than 30 such applications with the Department over the past 8 years and received authorization to deploy close to 2,000 miles of fiber in the state. But there are no other docketed applications to my knowledge. So essentially, there is a discriminatory statute and regulation on the books which applies to only a handful of the broadband competitors conducting business in the state.

POLICY REASONS FOR ACTION

- What obligation does the Department and the Working Group have to address these two problems? We believe there are several compelling legal and policy reasons why these issues merit the attention of state government and this Council.
- Under Section 224 of the Federal Telecommunications Act, utilities are required to provide telecommunications carriers and cable systems with non-discriminatory access to any poles, ducts, conduits and rights-of-way owned or controlled by it. The FCC was further directed by Congress to ensure that terms and conditions for pole attachments are just and reasonable.
- The FCC noted with concern in its National Broadband Plan last year that the most significant obstacle to the deployment of fiber transport is the inability of broadband providers to obtain access to pole attachments in a timely manner.
- The FCC reiterated its concern about timely access to poles in its May 2010 Order and Notice of Proposed Rulemaking on pole attachments. The Commission held that access to pole attachments including make-ready work must be timely in order to be just and reasonable.
- Although Connecticut is one of the states that have certified to the FCC that it will self-regulate pole attachment rates, terms and conditions, the state must do so in accordance with these fundamental principles.
- Relying on the Connecticut General Statutes, the DPUC committed in its 2008 Pole Decision to create pole attachment standards and initiate a long term process to ensure a level playing field in the public rights of way. The Department has appointed a Mediation team to handle specific complaints and problems on a case by case basis, and asked representatives of pole owners, attachers and municipalities to work together to resolve open issues through meetings of a Working Group.
- At a technical meeting held last February, Commissioner Palermino reiterated the need for the Working Group to continue its efforts to reduce licensing timeframes and to consider creative solutions to making the competitive environment better. Then in May, the Department ordered CL&P and interested pole attachers to use the Working Group to negotiate final language for CL&P's Pole Attachment Agreements.

A CRITICAL JUNCTURE HAS BEEN REACHED

- The Working Group has made progress in resolving differences about the content of CL&P's new pole attachment agreement. I expect that new agreements should be filed with the Department in the CL&P rate case with the general support of the participants by the beginning of the year.
- However, the efforts of the Working Group to achieve a level playing field as required by the National Broadband Plan and the Department's Pole Decision have now reached a critical juncture for two reasons.
- First, the Working Group has not accepted any of the proposals made by Fibertech on other participants to expedite licensing and make-ready to process customers installations more quickly.
- Second, neither AT&T or United Illuminating have committed to revising their own pole attachment agreements to match the negotiated terms of the new CL&P agreement. As a matter of fact, AT&T has not even modified its pole agreements to incorporate the requirements of the Department's 2008 Pole Decision. And both AT&T and CL&P intend to charge private broadband providers separate licensing and make ready fees without any adjustment for duplication, so licensing fees and costs have effectively doubled.
- I believe that both of these problems can be substantially improved through some relatively small changes in the pole licensing system. That is one reason why I was excited about speaking with this Council today. Your role as an advocacy group and as a coordinator for state efforts to expand fiber systems and broadband internet networks could be important in encouraging action by the Working Group, the pole owners, and the Department on these issues.

TEMPORARY POLE ATTACHMENTS

- One proposal which I would ask this Council to consider supporting is the use of temporary pole attachments in certain limited situations to expedite customer installations.
- What is a temporary attachment? It is a short term attachment of fiber cable and usually a support arm placed within the communications space on the pole. The temporary attachment is made outside of any of the worker safety spaces with proper clearances and without drilling through the pole.
- A temporary attachment is normally removed and replaced with a permanent attachment installed by drilling through the pole. This permanent installation is done within 30 days after the attacher receives notice that the make-ready work is completed.
- An expert electrical consultant who formerly served on the Committee which interprets the National Electric Safety Code has issued a detailed letter to the Working Group on behalf of Fibertech certifying that temporary attachments of this nature can be installed consistent with the NESC.

USE OF TEMPORARY ATTACHMENTS IN OTHER STATES

- Connecticut would not be breaking new ground by allowing temporary attachments since temporary attachments are already in use in the Northeast and other places around the country.
- For example, The New York Public Service Commission – Authorized temporary attachments to be used to install facilities to compensate attachers for make-ready delays and impediments to pole access. In New York, a standard permanent attachment is required to be installed within 30 days after make-ready work is completed. Order, Case 03-14-0432, Proceeding on Motion of Commission concerning Pole Attachment Issues (August 6, 2004). These kinds of attachments have now been deployed on hundreds of poles in New York, mostly in and around Buffalo, Albany and Westchester County.
- The Oregon Public Service Commission has also issued regulations which allow temporary attachments. The regulations state that if any delay occurs in issuing a license application, then the pole attacher may proceed with a temporary or permanent attachment to service the customer initially. Oregon Administrative Rules, Section 860-028-0000.

REGULATORY PRACTICES IN OTHER JURISDICTIONS

- In New Jersey, the Board of Public Utilities – Ordered pole owners to permit cable companies to install their network facilities, using pre-make ready attachments in a manner consistent with the National Electric Safety Code. This order has been relied upon by telecommunications companies to gain pre-make ready access to poles for fiber installations where access has been unduly delayed. Decision and Order, Docket No. 769C-6206 et al., In re Office of Cable television's Investigation into Practices and Operations of CATV Companies.
- Finally, in 2000, the Federal Communications Commission - Ordered a Virginia power company to eliminate licensing delays by allowing the telecommunications attacher to install temporary or permanent attachments immediately. Order and Request for Information, Cavalier Telephone v. Virginia Electric & Power Co., June 7, 2000.
- These administrative decisions were issued even before the FCC urged utilities to reevaluate their standards and practices in the National Broadband Plan in order to remove barriers to speedy broadband deployment.

PROPOSAL FOR USE OF TEMPORARY ATTACHMENTS

- Fibertech has proposed to the Working Group that third party attachers be authorized to use a NESC-compliant temporary attachment to install a fiber network or cable television system in two circumstances. The first would be whenever the Pole Owners are unable to issue a license within the required DPUC deadline of 90 or 125 days. Based on the Working Group's analysis, approximately 10% to 15% of all applications would be eligible for a temporary attachment as a remedy for an unreasonable delay of this nature.
- The other circumstance for the use of temporary attachments addresses the goal of reducing time intervals on applications with fewer poles and limited make-ready work. Under this proposal, if a license has not been issued within 45 days and the application involves less than 25 poles and requires make-ready work on no more than 4 poles, then the attacher would be allowed to install using a temporary attachment. This would likely apply to a few dozen licenses each year.

PROPOSAL TO STANDARDIZE POLE ATTACHMENT AGREEMENTS AND LICENSING PRACTICES

- The second idea I would ask this Council to think about is to encourage the Pole Owners to standardize their licensing processes and agreements. There is no legal or practical reason why licensees should have to negotiate and sign different agreements with AT&T, CL&P and UI in order to use the public rights of way.
- The CL&P rate case pointed out the many inconsistencies between the licensing requirements of the Department's Pole Decision and the pole agreements under which the pole owners operate. Now that the Working Group including representatives of AT&T and UI has essentially reached an agreement with CL&P as to what is legally and practically required after months of meetings and conference calls, there is no valid reason why all pole owners shouldn't agree to modify their agreements accordingly. It would be a great disappointment to many members of the Working Group if a complaint to the Department was required to achieve consistency in pole administration standards.
- Similarly, there has been no real change in the plans of CL&P and AT&T to each charge private third party attachers separate application and processing fees, in place of the single fee which AT&T used to charge for pole licenses in CL&P territory. They insist that the planned 100% increase in fees reflects each company's actual costs, so it purportedly doesn't constitute any double billing which the Department specifically directed them to eliminate. But the simple fact is that if you filed an application today for the same broadband project that you did one year ago, the licensing fee will be twice as great.

COUNCIL ACTION COULD BE IMPORTANT ON THESE ISSUES

- I would respectfully suggest that this Council should consider recommending the elimination of these duplicative and inconsistent agreements and fees, as an obvious hindrance to broadband deployment in Connecticut.
- You may have noticed, however, that I have not taken a position on the suggestions made by my colleagues at the Office of Consumer Counsel and CCM to establish a single pole administrator under the supervision of the DPUC or the State. I continue to believe and to hope that the pole owners will take their responsibilities as public service companies seriously, and devote the additional personnel and renewed attention needed to make a privately-owned system work efficiently.
- It can be done. And perhaps this Council could reenergize the positive momentum of the past few years by supporting the selective use of temporary pole attachments and the elimination of administrative duplication by pole owners.
- Thank you for your time and attention today. I remain available to answer any questions that the Council members may have about my remarks.